Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

LURLENE MENCER,

Petitioner,

vs.

CLEVELAND HAMMONDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, the petitioner seeks to hold a public official liable for intentional racial and sexual discrimination in promotions to school principal and the official has conceded that he knew the law against such discrimination was clearly established at the time of the challenged decisions. The following questions are presented in the context of summary judgment:

1. Whether the courts of appeals have interlocutory jurisdiction to review a district court's denial of qualified immunity in appeals which turn only on the sufficiency of the evidence of intent to discriminate and involve no *bona fide* question of whether such intentional discrimination violates clearly established law?

2. Whether a public official is due qualified immunity from claims of intentional racial and sexual discrimination in employment opportunities when he concedes he knew such discrimination violated clearly established law but he denies that he had the requisite intent to discriminate?

3. Whether a public official's qualified immunity in such a case turns on his subjective state of mind about whether he had intentionally discriminated on the basis of race or sex, or turns, instead, on the objective state of the law prohibiting such discrimination at the time it occurred?

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Lurlene G. Mencer
Cleveland Hammonds

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OPINIONS BELOW

The United States District Court for the Northern District of Alabama denied summary judgment on qualified immunity grounds on July 26, 1995 and denied reconsideration of such decision on August 31, 1995. The decisions of the District Court are unreported and are reproduced in the attached Appendices B and C. The reversal of the District Court by the Court of Appeals for the Eleventh Circuit, issued on February 5, 1998, is reported as *Mencer v. Hammonds*, 134 F.3d 1066 (11th Cir. 1998), and reproduced in Appendix A. The Court of Appeals denied petitioners petition for rehearing and suggestion for hearing *en banc*, without opinion, on June 5, 1998, and that decision is reproduced in Appendix D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The petitioner alleged intentional racial and sexual discrimination in the denial of promotions to school principal in violation of the equal protection clause of the Fourteenth Amendment and 42 U.S.C. § 1983. The equal protection clause states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

42 U.S.C. § 1983.

STATEMENT OF THE CASE

On June 21, 1994, Lurlene Mencer ("Mencer") filed a complaint against Cleveland Hammonds ("Hammonds"), superintendent of the Birmingham Board of Education,[1] alleging that she had been denied promotions to principal because of her race and sex in violation of the equal protection clause of the Fourteenth Amendment.[2] Hammonds moved for summary

1. The Birmingham Board of Education was also named as a defendant in Mencer's complaint, but is not a party to this Petition.

2. Mencer also brought her claim of race and sex discrimination pursuant to Title VII of the Civil Rights Act of 1964. Summary judgment on that claim was denied, but proceedings were halted pending the interlocutory appeal of the denial of qualified immunity to one of the defendants, Hammonds, which is the subject of this Petition. *Res judicata* is now asserted against the Title VII claims in the District Court on the basis of the Court of Appeals' findings in the interlocutory appeal of the qualified immunity issue. Mencer's complaint also contained allegations of discrimination on the basis of age and violation of her due process rights. These claims were disposed of by the District Court on summary judgment and are not pertinent to this Petition. App. C-18a-19a.

judgment against Mencer's equal protection claim on the ground that he was entitled to qualified immunity because he had no intent to discriminate. Hammonds conceded that Mencer had established a *prima facie* case of intentional race and sex discrimination.[3] Hammonds argued, however, that he was due qualified immunity because Mencer could not show that the reasons given for not promoting her were a pretext for intentional racial or sexual discrimination.

The District Court denied summary judgment, finding that "Plaintiff has produced sufficient evidence of conduct violative of the equal protection clause on the part of Dr. Hammonds." App. C-19a-20a. Mencer's evidence of intent to discriminate consisted of: (1) a letter in which Hammonds stated that he preferred to replace a white principal with another white principal at Gibson Elementary School; (2) contradictory testimony by Hammonds attempting to explain away such letter; (3) Mencer's above-average performance appraisals which contradicted Hammonds' effort to articulate performance as the reason for not selecting Mencer; (4) Mencer's numerous achievement awards for outstanding performance while serving as an Interim Principal that further contradicted Hammonds' effort to criticize her performance[4]; (5) inconsistent testimony

3. *See* Defendants' Motion For Summary Judgment filed in the District Court on April 28, 1995.

4. Mencer received numerous achievement awards while she was Interim Principal at another school, Arrington Middle School, including an Outstanding Leadership Award and Resolution commending her performance in dispersing gang violence that had plagued Arrington, an award for helping children overcome emotional problems and become successful students, an Outstanding Volunteer Award for the many hours spent after school in developing Arrington's programs, and the most prestigious award of the school year — the VIPS Principal of the Year Award — while still only an Interim Principal in the Birmingham school system. *See* Mencer Affidavit, Exhibit 49 in the District Court.

by Hammonds about when he had talked with Dr. Contri about the performance of Mencer; (6) a finding by the EEOC that Mencer's "relevant experience was more than 2 and ½ times greater than [the white male candidate's] experience"; (7) a finding by the EEOC that the white candidate had no experience as an assistant principal or interim principal, but Mencer did; (8) a finding by the EEOC that Mencer had greater education than the white male applicant; (9) a finding by the EEOC that Hammonds had admitted during its investigation "that race was a consideration in his decision"; (10) testimony by Hammonds that the selection was based on nothing more than his subjective opinion of the two candidates; (11) an admission by Hammonds that he believed males made better disciplinarians than females as principals; and (12) an ultimate finding by the EEOC that "[i]t can only be concluded that there is reasonable cause to believe that [Mencer] was denied the principal position because of her race and sex."[5]

The District Court not only found that there was "sufficient evidence" of pretext and intent to discriminate on the part of Hammonds, but also found that "[a] reasonable government agent would have known that denying a person a promotion on the basis of race or gender violates clearly established constitutional law." App. C-19a. The District Court was asked by Hammonds to reconsider the decision that there was sufficient evidence of intent to discriminate. App. B-12a. The District Court did so before issuing a second opinion "that reaffirms the original finding [of sufficiency of the evidence of intent] and again instructs Dr. Hammonds that he is NOT immune from this suit." App. B-12a.

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5. *See* Plaintiff's Submission Of Evidence In Reply To Defendants' Motion For Summary Judgment, Exhibits 1 through 50, filed in the District Court.

An interlocutory appeal of the denial of qualified immunity was filed which challenged only the sufficiency of the evidence of intent to discriminate. Hammonds conceded in his appellate brief that he knew racial and sexual discrimination violated "clearly established law." At page 23 of his principal brief in the Court of Appeals, he stated:

> It is conceded by Dr. Hammonds that the law against race and gender discrimination was clearly established and he knew that subjectively and objectively.

Def. Br., p. 23. Nevertheless, Hammonds argued on appeal that he was due qualified immunity because he did not have an intent to discriminate. He directly challenged the trial court's finding of "sufficient evidence" of intentional racial and sexual discrimination.

The plaintiff opposed the Court of Appeals' jurisdiction to hear an interlocutory appeal that turned solely on the sufficiency of the evidence of intent to discriminate, arguing that interlocutory jurisdiction does not exist under this Court's decisions in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 312-314 (1996).

The Court of Appeals for the Eleventh Circuit accepted interlocutory jurisdiction and then reversed the trial court

> because we find that none of Mencer's evidence creates a jury issue as to Hammonds' intent to discriminate against Mencer, and that therefore Hammonds did not violate clearly established law.

App. A-6a.

On the jurisdictional issues, the Court held that interlocutory appeals are permissible when the question of qualified immunity turns on the sufficiency of the evidence of intent to discriminate even though there is no issue on the appeal about whether such discrimination would violate "clearly established law." The Eleventh Circuit expanded the right to appeal an interlocutory denial of qualified immunity to cases that turns solely on the issue of sufficiency of the evidence of intent because, in its view, "the actor *cannot* know he is violating clearly established equal protection rights unless he harbors discriminatory intent." App. A-9a. In this way, disputes about subjective intent replaced objective knowledge of the law as the springboard to interlocutory appeals of qualified immunity in the Eleventh Circuit.

The decision below also went beyond the question of appellate jurisdiction and created a standard to be applied by the district courts which makes qualified immunity turn on the subjective intent of the government actor rather than the objective state of the law. App. A-9a. The Eleventh Circuit held that "a district court must make a determination regarding intent as part of the first prong of its 'qualified immunity inquiry' " because "the actor *cannot* know he is violating clearly established equal protection rights unless he harbors discriminatory intent." App. A-9a. Thus, qualified immunity in intent-based cases in the Eleventh Circuit will henceforth turn not on the objective reasonableness standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 815-818 (1982), but on the government actor's subjective intent to discriminate. App. A-10a, n.7.

The decision below occurred before the issuance of *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), but the latter decision was argued to the court below in a letter supplementing the Petition For Rehearing And Suggestion Of Rehearing *En*

Banc pursuant to F. R. App. P. 28(j). That Petition was denied about a month after the decision in *Crawford-El*, *supra*, was argued to the Eleventh Circuit.

The Court of Appeals' reversal of the trial court's findings of sufficient evidence of intent to discriminate in the interlocutory appeal of qualified immunity on Mencer's equal protection claim has now been asserted in the District Court as a bar to her Title VII claims against the Birmingham Board of Education and Hammonds on the basis of *res judicata* principles. Mencer's race and sex discrimination claims under Title VII of the Civil Rights Act of 1964 were filed with the EEOC nearly six years ago on November 9, 1992, and with the District Court more than four years ago on June 21, 1994. Such claims under Title VII would have been resolved by trial several years ago in the absence of the interlocutory appeal of the sufficiency of the evidence of intent on the equal protection claim by one of the defendants — Hammonds.

REASONS FOR GRANTING THE WRIT

I. A Conflict In The Circuits Exists Concerning Interlocutory Review Of A District Court's Denial Of Qualified Immunity Based Solely On Sufficiency Of The Evidence Of Intent

There is considerable confusion in the lower courts about whether appellate jurisdiction exists for interlocutory review of a qualified immunity appeal that turns on the sufficiency of the evidence of intent to discriminate. The Eleventh Circuit has held in the current case that such jurisdiction exists because "the actor *cannot* know he is violating clearly established equal protection rights unless he harbors discriminatory intent" and, therefore, the sufficiency of the evidence of such intent is really part of the core legal issue of whether "clearly established"

law was violated. App. A-9a (emphasis in original). Other Circuits have reached the opposite result, holding that interlocutory appellate jurisdiction does not exist where the qualified immunity turns on the sufficiency of the evidence of intent. *Carter v. Rhode Island*, 68 F.3d 9, 13 (1st Cir. 1995); *Tang v. State of Rhode Island Dept. of Elderly Affairs*, 120 F.3d 325, 327-328 (1st Cir. 1997); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223-1224 (9th Cir. 1996); *Shinault v. Cleveland County Bd. of County Comr's*, 82 F.3d 367, 370-71 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 740 (1996); *see also Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997). A number of spirited dissents have also demonstrated the confusion in the lower courts over when an appellate court has jurisdiction to review a trial court's interlocutory denial of qualified immunity that turns on the sufficiency of the evidence and how such a factual review should be conducted when jurisdiction is found to exist. *Colston v. Barnhart*, 146 F.3d 282, 286-295 (5th Cir. 1998) (DeMoss, J. dissenting); *Rich v. Johnson*, 131 F.3d 1092, 1101-1102 (4th Cir. 1997) (Murnaghan, J. dissenting); *Winfield v. Bass*, 106 F.3d 525, 542-552 (4th Cir. 1997) (Phillips, Hall, Murnaghan, Ervin and Michael, J. dissenting from *en banc* decision); *Blair v. Meade*, 76 F.3d 97, 102 (6th Cir. 1996) (Ryan, J. dissenting).

The issue is an important one. At stake is the proper allocation of fact-finding functions between the district courts and the courts of appeals, and the ability of litigants to gain a speedy trial of controversies that the District Court has found to involve substantial evidence of intent to discriminate on the basis of race or sex in employment opportunities. Also at stake is the principled application of the jurisdictional statutes enacted by Congress that limit the jurisdiction of the courts of appeals to "final judgments." The only exception is the judge-made "collateral order doctrine" which is strictly limited to orders that are truly collateral to, and separate from, the merits of the controversy. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.

541, 544, 546 (1949) ("This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. * * * We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."); *see Behrens v. Pelletier*, 516 S. Ct. 249, 313 (1996) (". . . if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*.' "); *Johnson v. Jones*, 515 U.S. 304, 310, 314 (1995) (same); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993); (" 'To come within the "small class" of *Cohen*, the order must (1) conclusively determine the disputed question; (2) resolve an important issue *completely separate* from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment' ") (emphasis added).

The decision in the current case sweeps away the "separability" requirement altogether. The Eleventh Circuit has expanded interlocutory appellate review to appeals that have only one issue — the sufficiency of the evidence of intent to discriminate. Such issue is not "separable" from the merits in any fashion whatsoever. The issue of intent to discriminate is the central issue on the merits of an equal protection claim. *Washington v. Davis*, 426 U.S. 229, 239-45 (1976); *see also United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (" 'factual inquiry' in Title VII case is 'whether the defendant intentionally discriminated against the plaintiff' "); *Pullman Standard v. Swint*, 456 U.S. 273, 276, 287-288 (1982) (Intent to discriminate on the basis of race "is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard."); *Davis v. Passman*, 442 U.S. 228, 235 (1979).

By making qualified immunity in intent-based cases turn on the sufficiency of the evidence of intent, the Eleventh Circuit has rendered the entire category of qualified immunity cases unappealable on an interlocutory basis because there is no longer any separable component of such cases that satisfies *Cohen* and its progeny. It was only the separability of the legal issues in the qualified immunity defense from the factual issues on the merits of the claim that made the immunity issue appealable on an interlocutory basis in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and later cases. *See Johnson, supra*, 515 U.S. at 317-318. The conflation of the legal and factual issues by the Eleventh Circuit puts the appealability of the whole category of qualified immunity cases in doubt unless the Court intends to resort to a wholesale abandonment of the finality requirement in the jurisdictional statute. That course was definitively rejected in *Johnson, supra*. *Id.* at 317-318 (discussing the need for "fidelity to statute" limiting appellate jurisdiction to "final" decisions.).

The decision below provides no coherent basis for characterizing the factual issue of intent to discriminate as "separable" or "independent" from the merits of the claim of race or sex discrimination. Although the Eleventh Circuit asserts that the issue of whether the defendant knew of "clearly established law" against racial discrimination depends on whether he "harbors discriminatory intent," that is obviously untrue. App. A-8a-9a. Whether there is clearly established law against intentional discrimination is not dependent on whether a particular government actor has a discriminatory intent. The only thing that is dependent on proof that the actor harbored a discriminatory intent is the merits of the claim itself, not the separate issue of whether he knows there is clearly established law against such intentional discrimination. *Carter*, 68 F.3d at 13 ("*Johnson* announces a jurisdictional rule . . . and not one to be undone by recasting fact-based rulings denying summary

judgment on qualified immunity defenses into law-based 'collateral orders' immediately appealable under *Cohen*."); *cf. Colston*, 146 F.3d at 288 (DeMoss, J. dissenting) (when the issue on appeal is not separate from the merits, this "single factor is completely determinative of the absence of appellate jurisdiction").

The Eleventh Circuit also characterized the district court's decision as one involving both the issue of "evidence sufficiency" and whether "a reasonable person in Hammonds' position would have known his conduct violated clearly established law." App. A-7a. It is clear, however, that there was no *disputed* issue about whether intentional racial or sexual discrimination violated clearly established law because, in the defendants' own words, "[i]t is conceded by Hammonds that the law against race and gender discrimination was clearly established and he knew that subjectively and objectively." Def. Br. to Eleventh Circuit, p. 23. Nevertheless, the Eleventh Circuit held that it could still exercise interlocutory jurisdiction "[e]ven if the court had based its denial only on a bald assertion that sufficient evidence existed to allow a jury to find the equal protection violation" because "[a] determination of whether the evidence supports a finding that a defendant engaged in certain conduct . . . is necessary to reach a determination of whether that conduct violated clearly established law." App. A-7a-8a. It did not matter that there was no issue about "clearly established law" to reach because that issue was stipulated by the defendant and no honest government official could possibly argue that the prohibition on racial or sexual discrimination was not "clearly established." Nor did it matter that the only real issue in the appeal was the sufficiency of the evidence of intent to discriminate or that this was the only issue actually decided on the merits of the appeal. App. A-6a and 11a.

The decision below essentially bootstraps interlocutory jurisdiction over a purely factual appeal by not requiring any *bona fide* dispute about the legal issue of whether intentional race and sex discrimination violates "clearly established law." The First, Ninth and Tenth Circuits reject such an approach to the jurisdictional statute refusing appellate jurisdiction when the issue on appeal turns on the sufficiency of the evidence of intent.[6] The Fourth, Fifth and Sixth Circuits apply a more expansive view of their jurisdiction over interlocutory decisions that turn on the sufficiency of the evidence of intent that is similar to, but not nearly as broad as, the scope of review applied by the Eleventh Circuit in the current case.[7] The First Circuit has defined the conflict in the circuits, noting that "[i]n a few circuits, it appears that courts have responded by squeezing *Johnson* a bit and effectively granting interlocutory review of denials of qualified immunity based on alleged factual disputes about intent; but this circuit and a number of others have resisted that course." *Tang*, 120 F.3d at 327.[8]

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6. *Tang v. State of Rhode Island Dept. of Elderly Affairs*, 120 F.3d 325, 327-328 (1st Cir. 1997); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223-1224 (9th Cir. 1996); *Shinault v. Cleveland County Bd. of County Comr's*, 82 F.3d 367, 370-71 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 740 (1996).

7. *Colston v. Barnhart*, 146 F.3d 282 (5th Cir. 1998); *Rich v. Johnson*, 131 F.3d 1092 (4th Cir. 1997) (*en banc*); *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997); *Blair v. Meade*, 76 F.3d 97 (6th Cir. 1996).

8. Although the First Circuit hoped that "[b]ecause the Supreme Court has granted review in *Crawford-El*, an answer to the quandary may be forthcoming," the Eleventh Circuit was fully aware of the decision eventually entered in *Crawford-El* when it denied rehearing below. The decision in *Crawford-El* supports the approach of the First, Ninth and Tenth Circuits that adhere to *Johnson, supra*, 515 U.S. at 317-318, by denying interlocutory jurisdiction over appeals that turn on

(Cont'd)

The conflict and confusion in the circuits stems from an explanation of *Johnson, supra*, that appeared the next term in *Behrens v. Pelletier*, 516 U.S. 299, 318 (1996). *See Colston*, 146 F.3d at 286-297 (5th Cir. 1998) (DeMoss, J. dissenting) (explaining how *Behrens* has been misapplied by various courts, including the Fifth Circuit). In *Behrens*, the Court explained that

> if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.

Behrens, supra, 516 U.S. at 313. The Court further stated that

> *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the Harlow standard of "objective legal reasonableness."

Id.

In that *limited context*, the Court in *Behrens* explained that

> *Johnson* recognizes that . . . "a court of appeals may have to undertake a cumbersome review of the

(Cont'd)
the sufficiency of the evidence of intent. *See Crawford-El*, 118 S. Ct. at 1595 (in refusing to adopt a heightened burden of proof when bringing intent-based claims against public officials, Court noted it had similarly refused to expand interlocutory appellate jurisdiction when immunity defense turns on evidentiary sufficiency.).

> record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Id. at 313 (citation omitted).

The Eleventh Circuit and others have read the explanation of *Johnson* in *Behrens* to open the door to interlocutory review of nothing more than the sufficiency of the evidence of intent and to substitute the appellate judges' views of the evidence for that of the trial court.[9] The foregoing explanation of *Johnson* in *Behrens*, however, does not apply to claims of intentional racial or sexual discrimination in which there can be no argument that such conduct "met the Harlow standard of objective reasonableness." *Behrens*, *supra* 516 U.S. at 313. In those cases there can be no genuine assertion that intentional racial or sexual discrimination meets "the Harlow standard of objective reasonableness." It is precisely "the Harlow standard

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9. *See Colston*, 146 F.3d at 285 (since district court's opinion only stated that it was denying summary judgment on the genuine issue of fact existed as to information trooper had prior to shooting plaintiff, majority found interlocutory jurisdiction proper by interpreting *Behrens* to allow the court to review the record and reverse the trial court's denial of qualified immunity because it found insufficient evidence to present a genuine issue of material fact for trial); *Rich*, 131 F.3d at 1101 (in reversing trial court's denial of qualified immunity because genuine issues of fact existed regarding official's knowledge of substantial risk, Fourth Circuit found interlocutory jurisdiction proper and undertook to review the record to determine whether sufficient evidence existed to support district court's conclusion); *Winfield*, 106 F.3d at 133 (after the district court denied qualified immunity because genuine issue of fact existed regarding defendants' knowledge of safety breaches through inmates' liberal access to weapons and alcohol, appellate court exercised interlocutory jurisdiction to conduct a *de novo* review of the evidence to determine what the *appellate* court found the evidence *actually* showed and if that created a triable issue without regard to the district court's findings) (emphasis added).

of objective reasonableness" that Hammonds stipulated away in the court below because no governmental actor can honestly maintain that intentional racial or sexual discrimination is "objectively reasonable" or not known to violate clearly established law.

In *Johnson* and *Behrens*, the Court made clear that an appellate court's "cumbersome review of the record" would only be permissible if a *bona fide* contention could be made that the conduct at issue "met the Harlow standard of objective reasonableness" and the trial court, nevertheless, failed to describe what conduct was shown by the evidence. Such a contention was not made in this case. More importantly, the trial court sufficiently described the conduct at issue — intentional racial and sexual discrimination in the denial of promotions to school principal. A trial court's decision not to belabor the record with subsidiary reasons for finding sufficient evidence of intent to discriminate should not serve to spring the door to appellate fact-finding in an interlocutory appeal. There is simply no *appealable* issue before the appellate court that requires such appellate fact-finding. A simple finding of sufficient evidence of intentional discrimination is all the description of the conduct necessary from the trial court for the Court of Appeals to decide the limited question that it has interlocutory jurisdiction over — the existence of "clearly established law" against such intentional discrimination. There is nothing in *Johnson* or *Behrens* which permits the appellate court to conduct a "cumbersome review" of the evidence in such a case. As the Tenth Circuit has held in *Shinault*, *supra*:

> [T]he relevant "assumed fact" is that Skinner fired Shinault for political patronage reasons, and Skinner does not contest the purely legal holdings that such an action violates Shinault's First Amendment right of association or that such a right was clearly

> established at the time of termination. Skinner contests the district court's factual determination, and thus we are without jurisdiction to review his appeal.

Shinault, 82 F.3d at 370-371. Notwithstanding, the Eleventh Circuit undertook it own review of the record, but did not conduct the review to determine the facts that the district court "likely assumed" in denying summary judgment as *Johnson* described. Rather, the appellate court engaged in its own factfinding and, in the process, viewed the facts in the light most favorable to Hammonds.

By extending jurisdiction over Hammonds' interlocutory appeal under the fiction that it was reviewing a purely legal issue and then addressing a purely factual issue of intent — an issue at the heart of Mencer's underlying claim — the Court of Appeals has undone the efforts of this Court to keep the merits of the plaintiff's claim separate from the qualified immunity defense in the decisions in *Johnson*, *Behrens*, and recently in *Crawford-El*.[10] In *Crawford-El*, the Court refused to impose a heightened burden of proof on plaintiffs bringing constitutional claims requiring improper intent. *Crawford-El*, 118 S. Ct. at 1594-1595. The Court reiterated that the showing of improper intent was a "pure issue of fact." *Id.* at 1591. Moreover, when discussing the interplay between the qualified immunity and constitutional claims involving improper motive or intent, the Court stated:

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10. The Court's decision in *Crawford-El* was issued while Mencer's petition for rehearing and suggestion for rehearing *en banc* was pending before the Court of Appeals. Mencer notified the Court of Appeals of this Court's decision and argued that the Court of Appeals exercise of jurisdiction and reversal of the district court's decision was inconsistent with the decision in *Crawford-El, supra*.

> [A]lthough evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation.
>
> . . . The court's clear and convincing evidence requirement applies to the plaintiff's showing of improper intent (a pure issue of fact), not to the separate qualified immunity question of whether the official's alleged conduct violated clearly established law, which is an "essentially legal question."

Id. at 1592 (citations and footnotes omitted).

In responding to the respondents' argument in *Crawford-El* that a heightened burden of proof of intent was needed to advance the interests behind qualified immunity,[11] the Court recognized the importance of these interests, but engaged in a balancing process between the public official's need for protection from vexatious litigation and a litigant's right to vindication for violations of constitutional rights. In light of other procedural protections available to public officials,[12] the

11. Some of the major interests served by allowing qualified immunity, include shielding public officials from the time, energy and costs associated with litigation, weeding out frivolous claims, and encouraging public service. *Id.* at 1592-93.

12. The Court noted that the Rule 56 of the Federal Rules of Civil Procedure governing summary judgment provide protection against

(Cont'd)

balance did not favor imposing a heightened burden of proof upon plaintiffs in the name of protecting public officials. Specifically, the Court noted:

> In the past we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defendant, *Gomez*, 446 U.S. at 639-640, 100 S. Ct. at 1923-1924, or requiring pleadings of heightened specificity in cases alleging municipal liability. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164-169, 113 S. Ct. 1160, 1161-1163, 122 L.Ed.2d 517 (1993). We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. *Johnson v. Jones*, 515 U.S. 304, 317-318, 115 S. Ct. 2151, 2158-2159, 132 L.Ed.2d 238 (1995). Our reasons for those unanimous rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive.

Crawford-El, 118 S. Ct. at 1595.

The Court's opinions in *Johnson*, *Behrens*, and *Crawford-El* demonstrate the need to define the scope of the judicially-

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(Cont'd)

frivolous lawsuits, the ability of a district court to limit the scope of discovery prior to a ruling on qualified immunity, and Congressional action taken with respect to reducing prisoner litigation impose some safeguards to reduce the effect of litigation involving public officials. *Id.* at 1594-95.

created exception allowing interlocutory appeals from orders denying qualified immunity without unduly infringing on a public official's need for protection from the burdens of litigation or a litigant's right to have his day in court. The Eleventh Circuit has completely ignored this Court's policy considerations and created its own standard for exercising jurisdiction over interlocutory appeals involving questions of evidentiary sufficiency. The Eleventh Circuit has sacrificed the rights of litigants to vindicate constitutional violations in favor of *carte blanche* review of interlocutory orders denying qualified immunity regardless of the grounds.

The Eleventh Circuit's exercise of jurisdiction over the interlocutory appeal in *Mencer* goes beyond mere misapplication of established legal principles. Rather, the Eleventh Circuit has adopted its own agenda for expanding the operation of qualified immunity by allowing government officials to immediately appeal a denial of qualified immunity even when the only question on appeal is whether the district court properly determined that sufficient evidence of discriminatory intent existed to create a triable issue. In so doing, the Eleventh Circuit has abandoned *Cohen*'s separability requirement, engaged in a review of the record to find facts that it liked rather than facts "likely assumed" by the district court, and unduly restricted a private citizen's access to the courts to redress constitutional violations by public officials.

Moreover, the Eleventh Circuit has greatly expanded *Behrens* to permit interlocutory review of the sufficiency of the evidence of intent even in circumstances where there is no contention that intentional racial and sexual discrimination "met the Harlow standard of objective reasonableness" and the trial court found sufficient evidence of such intent to preclude summary judgment. In doing so, the court below created a conflict with the First, Ninth and Tenth Circuits on an issue of exceptional public importance.

The decision below creates a right to interlocutory appellate review of the merits in *all* intent-based claims without exception. Every such case involves a dispute similar to that below over the sufficiency of the evidence of intent. Since the right to immediately appeal in the Eleventh Circuit now requires only a disagreement with the trial court's finding of sufficient evidence of intent to discriminate, *every* case against a government official qualified immunity for intentional racial or sexual discrimination may now be appealed on an interlocutory basis if the government official asserts qualified immunity. The *Cohen* exception to the statutory requirement of finality, however, applies to only a "small class" of cases, *Cohen*, *supra*, 337 U.S. at 546, that are "the exception, not the rule." That "small class" of cases is limited to those involving "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen*, *supra*, 337 U.S. at 546-47. *Johnson*, *supra*, 515 U.S. at 315 ("To take what petitioners call a small step beyond *Mitchell* . . . would more than relax the separability requirement — it would in many cases simply abandon it").

Opening the gates of interlocutory appeals so wide that the merits of all intent-based claims become immediately appealable contravenes every purpose that the finality limitation on appellate jurisdiction was intended to achieve. First, "an interlocutory appeal can make it more difficult for trial judges to do their basic job — supervising trial proceedings" because it can "threaten those proceedings with delay, adding costs and diminishing coherence." *Johnson*, 513 U.S. at 309. That has certainly occurred in the current case where all claims — including those against other defendants based on other statutes — have ground to a halt for several years because of the interlocutory appeal of just the equal protection claim by one of the two defendants.

Second, such an appeal

> also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Id. That too has occurred in the current case. The courts below must now grapple with the parallel claims under Title VII for the same intentional racial and sexual discrimination, albeit on a different evidentiary record and with the different questions of *res judicata* thrown in to boot. The trial court has found sufficient evidence of intent to discriminate to proceed to trial; the appellate court has disagreed in the context of its limited jurisdiction in interlocutory appeals of qualified immunity issues. Further appeals are almost a certainty on the parallel race and sex claims still pending in the trial court.

Third, "the issue here at stake — the existence, or non-existence of a triable issue of fact — is the kind of issue that trial judges, not appellate judges, confront almost daily." *Id.* 515 U.S. at 316. *See generally*, *Pullman Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings: 'Factfinding is the basic responsibility of district courts, rather than appellate courts. . . .' "). Even though "appellate judges enjoy no comparative expertise in such matters," *Johnson*, *supra*, 515 U.S. at 316, the decision below effectively shifts virtually every fact-based issue of intent to the appellate courts because it is the rare governmental official who can avoid the temptation of a second chance at summary judgment. The decision below relegates factfinding in the trial court to dress-rehearsal, rather

than the main event, which Congress intended when the courts were created.

Fourth, such displacement of the traditional fact-finding role of the trial courts occurs in the one area where their expertise is most important — intent-based claims of racial and sexual discrimination. This Court has already emphasized the importance of the trial court's role in discerning factual disputes needing trial in cases involving intent, and the added inefficiency of premature involvement of the appellate courts in such issues:

> . . . questions about whether or not a record demonstrates a "genuine issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases, unlike the simple "we didn't do it" case before us, involve factual controversies about, for example, intent-controversies that, before trial, may seem nebulous. To resolve those controversies — to determine whether there is or is not a triable issue of fact about such a matter — may require reading a vast pretrial record, with numerous conflicting affidavits, depositions and other discovery materials. This fact means, compared with *Mitchell*, greater delay.
>
> For a third thing, a close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by trial testimony) to require it, once again, to canvass the record. That is to say, an

> interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision. *See* 15A Wright & Miller § 3914.10 at 664 ["if immunity appeals] could be limited to . . . issues of law . . . there would be less risk that the court of appeals would need to waste them in duplicating investigations of the same facts on successive appeals").
>
> The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," we are persuaded that "[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law."

Johnson, supra, 515 U.S. at 317 (citation omitted).[13]

13. Recently, this Court reiterated the importance of allowing trial courts to manage the factfinding process. The Court stated:

> It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the factfinding process may be more useful and equitable to all parties than the categorical rule imposed by the Court of Appeals.

Crawford-El v. Britton, __ U.S. __, 118 S. Ct. 1584, 1598 (1998).

II. Qualified Immunity In The Eleventh Circuit Now Turns On The Subjective State Of Mind Of Individual Governmental Officials Rather Than The Objective State Of The Law

The decision below went beyond the question of appellate jurisdiction to hold that the district courts must condition qualified immunity in motive-based cases on the sufficiency of the evidence of intent. App. A-9a-10a. The court below held that because "[a] governmental actor . . . cannot violate a plaintiff's equal protection rights unless the defendant has the intent to discriminate . . . the actor cannot know he is violating clearly established equal protection rights unless he harbors discriminatory intent." App. A-9a. In doing so, the Eleventh Circuit has made the determination of qualified immunity dependent on the subjective state of mind of individual governmental actors rather than the objective state of law as required by the decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 818 (1982). *See also Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998) ("Evidence concerning the defendants' subjective intent is simply irrelevant to that defense."), 118 S. Ct. at 1599 (Rehnquist, J. dissenting) (In Harlow, "we 'purged' qualified immunity doctrine of its subjective component and remolded it so that it turned entirely on 'objective legal reasonableness', measured by the state of the law at the time of the challenged act. * * * This new rule eliminated the need for the disruptive inquiry into subjective intent, ensured that insubstantial suits would still be subject to dismissal prior to trial, and had the additional benefit of allowing officials to predict when and under what circumstances they would be required to stand trial for actions undertaken in the course of their work.").

No purpose is served by reintroducing an actor's subjective state of mind into the analysis of qualified immunity except to

open the door to interlocutory fact-finding by the appellate courts. If there is insufficient evidence of intent to discriminate, that can be ruled on by the district court on a routine motion for summary judgment on the merits without needless invocation of the qualified immunity defense. *Tang*, 120 F.3d at 327 (noting that district courts may grant summary judgment on the merits in weak cases without resort to qualified immunity.). In that way, claims under all statutes and for all defendants can be disposed of without piecemeal appeals that leave parallel claims and defendants in the district court while an individual official takes the one claim possibly subject to qualified immunity on an interlocutory appeal.

The only thing added by treating the merits of the claim of intentional discrimination as a part of the qualified immunity issue is the creation of a right to immediately appeal fewer than all the parties and fewer than all the issues. That is a meager return for the major disruption to orderly and efficient proceedings caused by making qualified immunity turn on the sufficiency of the evidence of intent to discriminate. The Court has already rejected such a trade-off in *Johnson*:

> We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing "clearly established" law, or (b) a determination about "genuine" issues of fact for trial, it still forces public officials to trial. And, to that extent, it threatens to undercut the very policy (proceeding public officials from lawsuits) that (the Mitchell Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the

> extensions of Mitchell to encompass appeals from orders of the sort before us.

Johnson, supra, 515 U.S. at 317-318 (parentheticals in original).

The current case is a good example of the problems that flow from conflating the merits of the claim of intentional discrimination with the qualified immunity issue. Mencer's claim of intentional racial discrimination in promotional opportunities was brought under two statutes (Title VII and § 1983) and against two defendants (the Birmingham Board of Education and Hammonds). If the question of the sufficiency of the evidence of discriminatory intent were treated in the normal manner as a part of summary judgment on the merits, all claims against all defendants would be reviewed together and piecemeal proceedings avoided. By treating the merits of such dispute as a part of the qualified immunity issue, however, the Court of Appeals had only one of the two claims against Hammonds and neither of the two claims against the Board of Education before it. The Title VII claim against Hammonds remained in the trial court as have both the Title VII claim and the § 1983 claim against the defendant Board.

The purpose of qualified immunity is not achieved in such a situation because the individual official remains in the trial court on the parallel Title VII claim, as does his employer who necessarily relies upon such officials' testimony in defense of the two parallel claims pending against it. What is achieved, however, is a complete abrogation of the Congressional limits on interlocutory appellate jurisdiction. *Carter*, 68 F.3d at 13 ("We can discern no permissible ground for treating the district court ruling — that there was a trialworthy issue of fact as to whether appellants harbored a discriminatory intent — as an immediately appealable law — based decision within the meaning of *Johnson*.").

CONCLUSION

The Court should grant *certiorari* to resolve a conflict in the courts of appeals about their jurisdiction to review interlocutory appeals of denials of qualified immunity which turn on the sufficiency of the evidence of intent to discriminate on the basis of race or sex rather than any *bona fide* issue of whether such intentional discrimination is prohibited by clearly established law. The Eleventh Circuit has established an expansive approach to such jurisdiction which treats questions of sufficiency of the evidence of intent to discriminate as a part of the analysis of the legal question of whether intentional discrimination is prohibited by "clearly established law." The First, Ninth and Tenth Circuits have rejected such an approach to their jurisdiction because the factual issue of intent is separate from the legal question of clearly established law. The Eleventh Circuit has also made qualified immunity turn on a given official's subjective state of mind rather than the objective state of the law at the time of the alleged wrong. Such decision is at odds which clearly established law and creates error of exceptional public importance about the application of qualified immunity principles to motive-based claims.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED FEBRUARY 5, 1998

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6827

D.C. Docket No. CV 94-B-1486-S

LURLENE G. MENCER,

Plaintiff-Appellee,

versus

CLEVELAND HAMMONDS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama.
(February 5, 1998)

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

Tjoflat, Circuit Judge:

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

Appendix A

In this case, a former teacher in the Birmingham, Alabama school system contends that the Board of Education and the Superintendent of Schools denied her equal protection of the laws, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983, when they failed to appoint her principal of an elementary school because of her race and sex.[1] Seeking both legal and equitable relief, she has sued both the Board and the Superintendent, the latter in both his official and individual capacities.

This interlocutory appeal is from the district court's order rejecting the Superintendent's defense of qualified immunity and denying him summary judgment on the plaintiff's equal protection claim for money damages. The appeal thus presents only one question: whether the Superintendent, in his individual capacity, is entitled to qualified immunity from suit under section 1983. We answer that question in the affirmative and therefore reverse.

I.

A.

This action commenced on June 21, 1994, when Ms. Lurlene Mencer, a former public school teacher,[2] sued the Birmingham Board of Education. She alleged that the Board

1. As we indicate *infra*, Mencer also claimed that the Board and the Superintendent violated other provisions of federal anti-discrimination law. These claims are not implicated in this appeal.

2. Ms. Mencer was employed as a teacher at all times relevant to this litigation. She resigned from her position as assistant principal at Smith Elementary School by letter dated November 19, 1992, and is no longer employed by the Birmingham system.

had violated her rights under 42 U.S.C § 2000e *et seq.* (1994) ("Title VII"), 42 U.S.C. § 1981 (1994), and 29 U.S.C. § 621 *et seq.* (1994) (the "ADEA"), by failing to promote her to an available principalship in the Birmingham school system. Mencer claimed that the Board discriminated against her on the basis of her race (African-American), age (54), and sex. She subsequently amended her complaint to add a claim that such discrimination violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, and sought legal and equitable relief under 42 U.S.C. § 1983 (1994).[3] At the same time, Mencer obtained leave to add the Superintendent, Dr. Cleveland Hammonds, as a party defendant in both his official and individual capacities with respect to each of the claims Mencer asserted against the Board.[4]

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3. Mencer also added an allegation that the Board of Education and the Superintendent "continuously passed over the plaintiff for principalship positions since 1979."

4. Under Alabama law, the Superintendent and the Board of Education act in concert when promoting a teacher. *See* Ala. Code § 16-12-16 (1995) ("The city superintendent of schools shall nominate in writing for appointment by the city board of education all principals, teachers, supervisors, attendance officers, janitors and all other employees of the board and shall assign to them their positions, transfer them as the needs of the schools require, [and] recommend them for promotion. . . ."). Neither entity can promote a teacher without the approval of the other. *See Marsh v. Birmingham Bd. Of Educ.*, 349 So.2d 34, 35-36 (Ala. 1977) (city superintendent cannot employ, promote, or dismiss teachers without Board approval); *Vodantis v. Birmingham Bd. of Educ.*, 373 So.2d 320, 321 (Ala. 1979) (neither board nor superintendent can dismiss without action of the other); *Board of Educ. of Escambia County v. Watts*, 19 Ala. App. 7, 9, 95 So. 498, 500 (1922) ("[T]he county board has no power to act until a principal has been recommended in writing by the superintendent of education. The power of selection is joint. . . .").

After the parties joined issue, the Board and Hammonds jointly moved for summary judgment on all of Mencer's claims. The Board's portion of the motion argued that all of Mencer's claims of discrimination failed for want of evidence of discrimination on the basis of race, sex, or age. Hammonds, in accordance with the twenty-third defense of his answer to Mencer's complaint, argued that the doctrine of qualified immunity protected him from liability for money damages with respect to Mencer's claim under the Equal Protection Clause.[5] The district court granted the motion in part, dismissing the ADEA and substantive due process claims, and denied it with respect to Mencer's remaining claims.[6] As for Hammonds' defense of qualified immunity, which it explicitly rejected, the court stated that "[p]laintiff has produced sufficient evidence of conduct violative of the equal protection clause on the part of Dr. Hammonds," and concluded that Hammonds' conduct had violated clearly established law. Hammonds now appeals the district court's denial of qualified immunity with respect to Mencer's equal protection claim.

B.

The salient facts are these. On June 10, 1992, a vacancy was posted in Birmingham schools for the positions of Principal

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5. Hammonds' twenty-third defense asserted that he was entitled to qualified immunity with respect to all of Mencer's claims for relief. In moving for summary judgment on the qualified immunity ground, however, Hammonds sought judgment only on Mencer's constitutional equal protection claim brought under § 1983.

6. The district court's dispositive order did not address Mencer's claim under 42 U.S.C. § 1981. Its failure to do so is of no moment in this appeal.

at Gibson and Minor elementary schools. Mencer applied for both positions. A screening committee subsequently interviewed thirty applicants and recommended five of those applicants to Hammonds for additional interviews. The five were Mencer, David Porter (a black male), Ken Walker (white male), Randle Key (black male), and Constance Moorer (black female). Hammonds selected Walker and Porter as the candidates most qualified for the positions at Gibson and Minor, respectively. Hammonds then went to the Board for approval for his selections.

In the interim, the principal at Baker elementary, Ronnie McFarling (white male), had requested a transfer to Gibson. When Hammonds reported to the Board, therefore, he recommended that McFarling be transferred to Gibson, that Walker be promoted to the resulting vacant principalship at Baker (rather than Gibson as originally intended), and that Porter be promoted to principal at Minor. The Board accepted Hammonds' recommendations, and the appointments were made.

There is no dispute that all of the successful applicants met the minimum qualifications for their positions as posted in the original vacancy notice; nor is it disputed that Mencer was qualified for the positions. Notwithstanding the qualifications of those who received the appointments, Mencer contends that Hammonds' and the Board's failure to promote her was discriminatory. Specifically, she claims that Hammonds intentionally discriminated against her because of her race and sex in violation of the Equal Protection Clause of the Fourteenth Amendment.

For evidence to support this claim, Mencer points to two statements. The first is a comment that Hammonds allegedly

made in an interview with Mencer in 1990, immediately before appointing her to a temporary assistant principalship. Mencer claims that Hammonds stated "we need more male principals" and that he coupled this comment with one regarding the need for discipline in the school system. The second piece of relevant evidence is a letter that Hammonds sent to the EEOC in response to an EEO investigator's queries about the large number of African-American principals in the Birmingham school system. Hammonds wrote: "When we reviewed our list of principals, you noted that we have few white principals. We are trying to maintain the present ratio of black and white. The former principals of Baker and Gibson were white."

The question before us is whether Hammonds is entitled to qualified immunity at this stage of the litigation. Because we find that none of Mencer's evidence creates a jury issue as to Hammonds' intent to discriminate against Mencer, and that therefore Hammonds did not violate clearly established law, the district court should have granted Hammonds immunity.

II.

A.

As a preliminary matter, Mencer challenges our jurisdiction to hear this case. She claims that the district court's denial of qualified immunity was based on an issue of "evidence sufficiency" and not on an issue of law. She argues that under the Supreme Court's decision in *Johnson v. Jones,* 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), we may not review a factual issue, and that we therefore have no jurisdiction over this appeal. *See id.* at 319-20, 115 S.Ct. at 2159 (holding that "a defendant, entitled to invoke a qualified-immunity

defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial"). We disagree both with Mencer's interpretation of the district court's order and with her assessment of *Johnson*.

The district court's denial of Hammonds motion was not based on its findings concerning disputed facts, but on its conclusion that at the time Hammonds acted, it was "clearly established" that his conduct violated the Equal Protection Clause. Though the court apparently found that Mencer had presented a prima facie case of discrimination sufficient to survive summary judgment, it did not specifically address any of the elements of that case. Thus, the court did not deny Hammonds qualified immunity based only on "evidence sufficiency" but on its belief that a reasonable person in Hammonds' position would have known his conduct violated clearly established law.

Even if the court had based its denial only on a bald assertion that sufficient evidence existed to allow a jury to find an equal protection violation, however, *Johnson* would not foreclose our review of this appeal. *See Behrens v. Pelletier*, 516 U.S. 299, __, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996) (an argument under *Johnson* that appeal is not available because the district court's decision rested on the existence of a material issue of fact is a "misreading of the case"). The Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), stated that an appellate court has jurisdiction under 28 U.S.C. 1291 (1994), to review a denial of summary judgment based on the issue of qualified immunity "to the extent that it turns on an issue of law." *Id.* at 530, 105 S.Ct. at 2817. A denial of qualified immunity at summary judgment necessarily

involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated "clearly established law" such that a reasonable person in defendant's position would have had notice that his actions were unlawful. *See Johnson v. Clifton,* 74 F.3d 1087, 1091 (11th Cir.) *cert. denied,* __ U.S. __, 117 S.Ct. 51, 136 L.Ed.2d 15 (1996). *Johnson* establishes only that a plaintiff may not base an interlocutory appeal on the district court's first determination *by itself. See Behrens,* 516 U.S. at __, 116 S.Ct. at 842 (explaining that *Johnson* only precludes appeal if "what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred . . .").

A determination of whether the evidence supports a finding that a defendant engaged in certain conduct, however, is necessary to reach a determination of whether that conduct violated clearly established law. *Cf. Wooten v. Campbell,* 49 F.3d 696, 699 & n.3 (11th Cir. 1995) (concluding that, in an appeal of denial of qualified immunity at the dismissal stage, the court must first determine whether plaintiff has pled sufficient facts to allege a violation of a constitutional right before determining whether the right was clearly established). Thus, if we are confronted with an appeal from a denial of qualified immunity, we may exercise our discretion to review the district court's preliminary determination as a means of reaching the issue of clearly established law.

In this case, it is unclear whether Hammonds' contentions on appeal are primarily directed at the district court's first or second determination. For instance, he phrases the issue in this

case as "[w]hether the trial court correctly decided that solely because race and sex discrimination were contrary to "clearly established law,' [Hammonds] would be denied qualified immunity. . . ." This could be either a challenge to the district court's determination that the law was clearly established, or an argument that the issue was not properly reached because the court erred in concluding that a jury could find Hammonds had engaged in certain conduct. Hammonds goes on to argue both issues in his brief, but he continues to confuse the two prongs of the inquiry. Because we favor the early resolution of qualified immunity issues, however, we believe that we must resolve any doubts over the scope of Hammonds' appeal in favor of jurisdiction over Hammonds' claims. *See Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991); *GJR Invs., Inc. v. County of Escambia, Florida,* __ F.3d __, __ (1998) ("Every successive stage to which a suit progresses reduces the effectiveness of the defense. . . .").

B.

In moving for summary judgment, Hammonds claimed qualified immunity in defense to a section 1983 claim that is based on an equal protection violation. A government actor, however, cannot violate a plaintiff's equal protection rights unless the defendant has the intent to discriminate. *See, e.g., Parks v. City of Warner Robins, Georgia,* 43 F.3d 609, 616 (11th Cir. 1995) ("[P]roof of discriminatory intent or purpose is a necessary prerequisite to any Equal Protection Clause claim."); *Washington v. Davis,* 426 U.S. 229, 239-45, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976) (same). Concomitantly, the actor *cannot* know he is violating clearly established equal protection rights unless he harbors discriminatory intent. *Cf. GJR Invs.,* __ F.3d at __ (holding that defendant was entitled

to qualified immunity from an equal protection claim at the dismissal stage because plaintiff failed to plead differential treatment and purposeful discrimination). Thus, even though intent is not "conduct" per se, a district court must make a determination regarding intent as part of the first prong of its qualified immunity inquiry. As explained *supra,* we may evaluate this determination on appeal.[7]

In this case, Mencer, in order to defeat Hammonds' defense of qualified immunity, had to present the district court with enough evidence to allow a reasonable jury to find that Hammonds intended to discriminate against her. She did not do so.

The two statements to which Mencer points are not related in any way to her particular case and are ultimately ambiguous. The alleged comment concerning a need for more male principals cannot support a finding of intent to discriminate against Mencer, as Hammonds promoted Mencer to assistant principal immediately after making the comment. The letter concerning a "ratio" of white to black teachers was made in response to a suggestion that the Birmingham school system employed a disproportionate number of *black* officials. We see no way that it could serve as a basis for a finding that Hammonds intended to discriminate against Mencer, who is black.

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7. Originally, in light of *Harlow v. Fitzgerald,* 457 U.S. 800, 815-18, 102 S.Ct. 2727, 2737-37, 73 L.Ed.2d 396 (1982) (stating that subjective intent is irrelevant on appeal from summary judgment based on qualified immunity), courts confronted with an appeal from a denial of qualified immunity were uncertain whether they could review a district court's conclusion that a material issue of fact existed concerning intent. We now recognize that when intent is a necessary element of the claimed violation, we may evaluate that determination. *See Edwards v. Wallace Community College,* 49 F.3d 1517, 1524 (11th Cir.1995).

There is nothing else in the record, taken in the light most favorable to the plaintiff, that would allow a reasonable jury to find that Hammonds intended to discriminate against Mencer on the basis of her sex or race.[8] Mencer's claim against Hammond in his individual capacity therefore cannot survive summary judgment because no reasonable person in Hammonds' position could have known that Hammonds' conduct violated Mencer's clearly established constitutional rights.

III.

For the above reasons, we reverse the judgment of the district court and instruct the district court to enter judgment for Hammonds in his individual capacity on Mencer's equal protection claim.

REVERSED.

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8. We must of course give deference to the district court's findings concerning Mencer's claim. The district court, however, made no specific finding on intent, stating only its legal conclusion that Mencer had "produced sufficient evidence of conduct violative of the equal protection clause." We therefore undertake our own perusal of the record. *See Johnson,* 515 U.S. at 319, 115 S.Ct. at 2159 (stating that if a district court does not state the facts it assumed for summary judgment, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court . . . assumed").

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED AUGUST 31, 1995

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 94-P-1486-S

LURLENE G. MENCER

Plaintiff,

vs.

BIRMINGHAM CITY BOARD OF EDUCATION and DR. CLEVELAND HAMMONDS in his individual and official capacity

Defendants.

OPINION

Defendant Hammonds has filed a Motion for Reconsideration of a prior Order denying his Motion for Summary Judgment based on qualified immunity. The prior order, dated July 26, 1995, articulated that: "A reasonable government agent would have known that *denying a* person a promotion on the basis of her race or gender violates clearly established constitutional law. Moreover, Plaintiff has produced evidence of conduct violative of the equal protection clause on the part of Dr. Hammonds." This opinion reaffirms the original finding and again instructs Dr. Hammonds that he is NOT immune from this suit.

Appendix B

This case is about the denial of a promotion of a black female to the position of school principal. Plaintiff alleges this failure to promote her was based on her race and her gender. Defendants deny these charges. Dr. Hammonds, the school superintendent, has tried twice to show that he is entitled to qualified immunity to shield him from individual liability for the alleged discrimination.[1] He claims the two prong test for qualified immunity has been overlooked, that 1) the conduct must violate clearly established constitutional or statutory rights and 2) a reasonable government actor would have known of these rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Rogers v. C.W. Miller*, 57 F.3d 986, 988 (11th Cir. 1995); *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1149 (11th Cir. 1994). The Eleventh Circuit has mandated that in order for qualified immunity to be surrendered, "preexisting law must dictate, that is, truly compel (not just suggest or allow to raise a question about), the conclusion that for every likesituated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Lassiter*, 28 F.2d at 1150. While Plaintiff must point to case law with materially similar facts to support the assertion of Defendant's knowing wrongdoing, the situations do not have to be identical. *Id.*

The prior Order details the case law in this area from the Eleventh Circuit and finds that the law is clearly established that Plaintiff is entitled to employment free from race and gender discrimination. Defendant's Motion for Reconsideration does not contest this conclusion. Rather Defendant has attacked

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1. The Eleventh Circuit has noted that "[t]he qualified immunity defense has no application to charges asserted against government actors in their official capacities, or to attempts to gain injunctive relief." *Rogers v. C.W. Miller*, 57 F.3d 986, 988 n.4 (11th Cir. 1995).

the notion that, despite the fact that the law is well established, somehow it is not reasonable for government actors to know such discrimination would violate the law. The Defendant's assertion, that qualified immunity exists for Hammonds because the exact factual scenario has not been expressly considered by a court before, is without merit.[2] Such a holding would create a stalemate in civil rights litigation where all government agents would receive qualified immunity unless a mirror-image case had been tried before in which plaintiffs prevailed, notwithstanding patently clear developments in the law. The Eleventh Circuit has rejected such a construction in *Hartsfield v. LeMacks* stating "to be clearly established does not mean that a court must have previously found the very action in question to be unlawful, but it does mean that in light of preexisting law the unlawfulness must be apparent." 50 F.3d 950, 955 (11th Cir. 1995) (citations omitted).

In light of case law regarding statutory and equal protection rights to be free from intentional racial and gender discrimination clearly established at the time of Defendant's alleged conduct, a reasonable superintendent of a large Birmingham city school system would have known that it is illegal to make hiring and personnel decisions based on race or gender.[3] *See Davis v. Passman*, 442 U.S. 228 (1979); *Cross v.*

2. Defendant claims that the only way Plaintiff can escape qualified immunity is to cite to a case "where the selection of three men, two white, over a woman plaintiffs leads to a bright-line finding of racial discrimination . . . [or a] case which holds that a public official automatically discriminates based on race when the selection process is generally sensitive to the racial diversity of the applicant and incumbents." Defendant Hammond's Motion for Reconsideration, para. 4 (filed Aug. 8, 1995).

3. Defendant points to *Rogers v. Miller*, 57 F.3d 986 (11th Cir.

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state of Alabama, 49 F.3d 1490 (11th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056 (11th Cir. 1992). In light of the foregoing discussion, Defendant's Motion is denied, and he is not entitled to qualified immunity in this litigation.

Dated: August 31, 1995

s/ Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.

(Cont'd)
1995), as support for the assertion that qualified immunity is appropriate. This case is distinguished because it involved First Amendment issues rather than the Equal Protection Clause.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED JULY 26, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. CV 94-P-1486-S

LURLENE G. MENCER,

Plaintiff(s);

-vs.-

BIRMINGHAM CITY BOARD OF EDUCATION, ET AL.

Defendant(s).

Pending before the court is a Motion for Summary Judgment filed by Defendants Birmingham City Board of Education (the "Board") and Dr. Cleveland Hammonds. As explained below, Defendants' Motion for Summary Judgment is hereby GRANTED in part and DENIED in part.

With respect to Plaintiff's Title VII claims based upon Defendants' failure to promote her to the position of principal on account of her race and her gender, because there are material facts in dispute. Defendants are not entitled to judgment as a matter of law.[1] To the extent that Defendants try to limit Plaintiff's promotional claim to only the vacancy at Baker Middle School, the court is not persuaded that *Coon v. Georgia*

1. Neither side appears to specifically address Defendants' potential liability under Section 1981 in their submissions, despite the statute's presence in Plaintiff's Complaint.

Pacific Corp., 829 F.2d 1563 (11th Cir. 1987), prevents Plaintiff from seeking redress for other promotions for which she was allegedly passed over on account of her race or gender. In *Coon*, Plaintiff was prohibited from pursuing additional claims of discrimination "like or related" to those in her EEOC charge because of her *complete* failure to plead those claims in her judicial Complaint. 829 F.2d at 1570. In this instance, other claims of discrimination in promotions are "like or related" to Plaintiff's initial Charge *and* Plaintiff amended her Complaint on August 1, 1994, to include Defendants' continuous failure to promote her since 1979. *See* Pl.'s Am. Compl. Para. 8. Consequently, unlike the individual in *Coon*, Plaintiff clearly put Defendants on notice that her claim of discrimination in promotion was not limited to the position at Baker Middle School. Moreover, the vacancies at Gibson and Minor Elementary and Baker Middle Schools arise out of the same common nucleus of operative fact. Specifically, the original openings sought after by Plaintiff were at Gibson and Minor. Moreover, the vacancy at Baker is directly tied to the vacancy at Gibson, as the former principal of Baker, Mr. McFarling, made a lateral move to Gibson; thereby leaving an opening at Baker. Consequently, the vacancies at Gibson and Minor are not so far removed and unrelated to the Baker position that pursuit of promotional claims based open these openings would unduly prejudice Defendants. To the extent that Defendants criticize the specificity of Plaintiff's pleading with respect to these additional promotional claims, a Rule 12(e) motion for a more definitive statement might have been in order. However, Defendants answered Plaintiff's Amended Complaint without filing such a motion. Accordingly, Defendants' Motion for Summary Judgment is hereby DENIED as it relates to Plaintiff's Title VII claims.[2]

2. With respect to the vacancy at Minor Elementary. Plaintiff seeks

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Appendix C

With respect to Plaintiff's age discrimination claim, Defendants' have carried their initial burden on summary judgment, and as noted during Motion Docket, Plaintiff does not oppose the entry of summary judgment in favor of Defendants on her ADEA claim. Accordingly, Defendants' Motion for Summary Judgment is hereby GRANTED as it relates to Plaintiff's ADEA claim.

Defendants have moved for summary judgment on Plaintiff's substantive due process claim based upon her purported demotion from interim principal at Arrington Middle School back to the position of assistant principal at Smith Middle School. *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995), in departing from previous precedent applicable in this jurisdiction, makes it clear that in the context of public employment, "an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component." Therefore, in light of *McKinney* even assuming that Plaintiff had a property right in her interim position at Arrington, she, as a matter of law, has no *substantive* due process claim against Defendants under Section 1983 for returning her to the assistant principal position at Smith Middle School. Accordingly, Defendants Motion for Summary

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(Cont'd)
a discriminatory promotion claim on the basis of her gender. *See* Pl.'s Mem. of Law at 27 ("The Plaintiff never asserted that she was denied the principal position at Minor because [illegible] therefore, the plaintiff does not contest the defendants' assertion that she cannot satisfy a prima facie case for race discrimination being denied the Minor position because of her race.").

Judgment as it relates to Plaintiffs substantive due process claim is hereby GRANTED.[3]

Dr. Hammonds has moved for summary judgment on the basis of qualified immunity as it relates to his potential individual liability under Section 1983 stemming from alleged violations of the equal protection clause. His argument that the law was not clearly established at the time of his alleged conduct that discrimination in promotions on the basis of race or gender violates the law is simply without merit. *See Davis v. Passman* 442 U.S. 228, 235 (1979) (recognizing that public employee has constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment); *Smith v. Lomax* 45 F.3d 402, 405 (11th Cir. 1995) (noting patently obvious illegality of racial discrimination in public employment); *Cross v. State of Alabama* 49 F.3d 1490, 1503 (11th Cir. 1995) (recognizing as clearly established law that sexual harassment and discrimination in work environment infringes upon legal rights and denying application of qualified immunity defense); *Yeldell v. Cooper Green Hospital*, 956 F.2d 1056, 1064 (11th Cir. 1992) (recognizing that equal protection right to be free from intentional race discrimination was clearly established at time of alleged conduct). A reasonable government agent would have known that denying a person a promotion on the basis of her race or gender violates clearly established constitutional law. Moreover, Plaintiff has produced

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3. Based upon her Memorandum of Law in Response to Defendants' Motion for Summary Judgment. Plaintiff does not appear to be pursuing any *procedural* due process claim against Defendants. *See* Pl.'s Mem. of Law at 35 ("In this case Ms. Mencer was not complaining about an improper post-termination hearing (a procedural due process claim). Rather, defendants deprived her *substantive* due process rights by demoting her." (emphasis added).

sufficient evidence of conduct violative of the equal protection clause on the part of Dr. Hammonds. Accordingly, Defendants' Motion for Summary Judgment is hereby DENIED as it relates to the defense of qualified immunity raised by Dr. Hammonds.

This the 26th day of July, 1995.

s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 5, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-6827

LURLENE G. MENCER,

Plaintiff-Appellee,

versus

BOARD OF EDUCATION, CITY OF BIRMINGHAM, ALABAMA,

Defendant,

CLEVELAND HAMMONDS,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Appendix D

Before: TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.